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## CITATIONS


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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

DONALD I. TILTON, WILFRED L. BECK, JR., GUY H. McCLEARN, JR., PETITIONERS

*v.*

MISSOURI PACIFIC RAILROAD COMPANY

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Donald I. Tilton, Wilfred L. Beck, Jr., and Guy H. McClearn, Jr.,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above consolidated cases on August 17, 1962.

### OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri (App., *infra*, p. 18a) are not reported.

[1] The government acts on behalf of these individual claimants to veterans' reemployment rights by virtue of Section 9(d) of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459(d).

The opinion of the court of appeals (App., *infra*, p. 1a) is reported at 306 F. 2d 870.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 26a) was entered on August 17, 1962. By order dated November 8, 1962, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans reemployed by their former employers are entitled to be restored only to that status or seniority which it could be foreseen, at the time they went into the service, that they would be absolutely certain to achieve.

## STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing

after discharge for a period of not more than 1 year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in this case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with

the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment.

* * * * *

## STATEMENT

Petitioners Tilton, Beck and McClearn were originally employed by respondent, the Missouri Pacific Railroad Company, as carmen helpers, a position of lesser status, responsibility and pay than that of journeyman carman mechanic. Under the applicable collective bargaining agreement, the seniority of helpers and journeyman carmen is separately computed. Since the Second World War there has been a shortage of qualified journeyman carmen, and to alleviate this shortage the Railroad and the Brotherhood of Railroad Carmen entered into an agreement permitting the "upgrading" of carmen helpers to "temporary carman" status. This agreement provides in substance that, if the Railroad's need for additional journeyman carmen cannot be filled by persons presently qualified as journeyman carmen, representatives of the Railroad and the Brotherhood may jointly se-

lect men from among the carmen helpers to be upgraded to temporary carman status. The agreement further stipulates that an upgraded helper shall automatically be considered as a qualified journeyman carman when he has completed 1040 days of service as temporary carman, and that he can acquire a seniority date as a carman after he has served the 1,040 days merely by making an election to that effect in writing.[3]

Petitioners were upgraded to temporary carman status under this agreement. They were, however, inducted into the armed forces before any of them could complete the 1040 days of service necessary to qualify them automatically as journeyman carmen. Upon their honorable discharge, they were reemployed by respondent as temporary carmen, the upgraded position. Petitioners thereafter completed the 1040-day work period necessary to qualify them as carmen, and each of them elected to become journeyman carmen and were so employed by the Railroad.

The Railroad, however, established petitioners' seniority as journeyman carmen as of the date each ac-

[3] The agreement provides, in pertinent part: "[Section 3.] (b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper" (App. 3a).

tually completed the work period. As a result, petitioners had seniority inferior to that of a number of temporary carmen who had been more recently upgraded but who—because they were not absent in the service of their country, as were petitioners—were able to complete the 1040-day service requirement before petitioners. On the ground that they were entitled under the Universal Military Training and Service Act to be treated as if they had continued in their employment during their military service, petitioners instituted these actions in the district court. They sought to compel the Railroad to accord them seniority as journeymen from the date they would have completed the service period and automatically qualified for advancements to carman but for their induction into the military. The district court dismissed petitioners' actions on the ground (App., *infra*, p. 24a) that:

> Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were.

The court of appeals affirmed, relying primarily on this Court's decision in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265. Reading that decision as requiring, in order for a veteran to be entitled to advancement in status, "that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight"

(App., *infra*, p. 14a), the court concluded that the promotions at issue here did not meet that standard. It observed that they could be affected by such "variables" as lay-offs due to illness or reduction in force, the continuing unavailability of enough qualified carmen to fill carmen's positions, continued satisfactory work by petitioners in the upgraded position and petitioners' decisions as to whether or not to elect full carman status (App., *infra*, p. 16a). Accordingly, the court held, eventual promotion of petitioners to permanent carman status could not have been foreseen with absolute certainty, and hence they were not entitled under the statute to seniority in that position as of the time they would have been promoted but for their induction.

## REASONS FOR GRANTING THE WRIT

The ruling of the court below—that returning veterans are not entitled to the status they would have achieved but for their military service unless it was predictable with absolute certainty when they left that they would have achieved such status—is in conflict with *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, and other decisions of this Court. It misapplies the standards enunciated in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, and is also in conflict with decisions of other courts of appeals. In view of these conflicts and the obvious importance of this question in the administration of remedial veterans' legislation, the decision should be reviewed by this Court.

1. Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, carries forward the reemployment provisions of earlier selective service acts which were enacted for the purpose of ensuring that a person inducted into the armed forces would not be penalized or disadvantaged in the pursuit of his civilian career, as a result of his absence. See, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284; *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, 357 U.S. at 270. In keeping with this purpose, this Court has ruled repeatedly that, under the Act, the returning veteran is entitled to be restored to the position and status he would have attained as of right had he remained continuously in his civilian employment. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284–285; *Oakley* v. *Louisville & N.R. Co.*, 338 U.S. 278, 283. The Court has held, too, that the Act is to be liberally construed. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285; *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, 357 U.S. at 270.

It is incontestible that petitioners will suffer a severe disadvantage solely as a result of their military service if their seniority as journeyman carmen is computed from the date they actually completed the 1040-day training period. Because of petitioners' absence in the armed forces, upgraded carmen helpers junior to them in the seniority roster were able to work in their stead; and, by completing the training period sooner, thereby to jump ahead of petitioners in seniority. As the court below recognized, that ad-

vance in seniority gave these nonveterans decided advantages over petitioners, "such as work preference, order of layoff, and order of recall" (App., *infra*, p. 7a). On the other hand, had petitioners not entered the service, they would have had a contractual right both to complete the training period prior to the other upgraded helpers and to be advanced automatically to journeyman status when they had done so.[3]

Petitioners are thus the very class of veterans the Act was most clearly designed to protect. In denying them that protection, the decision of the court below is in conflict not only with the principles laid down by the foregoing decisions of this Court but also with the precise holding of this Court in *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, which the court below refused to follow (App., *infra*, pp. 14a, 16a-17a).

The *Diehl* case presents a situation almost identical to that involved here. As here, Diehl was a carman helper upgraded to temporary carman mechanic under an agreement entitling him to elect status as a permanent carman mechanic upon the completion of a set training period.[4] As here, there was no way of forecasting with absolute certainty at the time Diehl entered the service whether or precisely when he would complete the service requirement; presumably all of the "variables" cited by the court below in this case (see p. 7, *supra*) were applicable in Diehl's

[3] And since, as the evidence showed, temporary carmen's work was in fact available while petitioners were in the service, there is little doubt but that they would actually have attained the promotion in question (App., *infra*, pp. 6a, 18a–19a, 24a).

[4] *Diehl* v. *Lehigh Valley R. Co.*, 211 F. 2d 95, 97 (C.A. 3).

case. As here, Diehl completed his training period only upon returning from military service, was given seniority as of the date he actually completed the training, and sought seniority as of the date on which he would have completed his temporary training had he not entered the service. The district court entered judgment against the veteran and the court of appeals affirmed. This Court unanimously reversed *per curiam* "upon the facts disclosed in the opinion of the Court of Appeals," citing *Oakley* v. *Louisville & N. R. Co., supra.*

The *Diehl* decision squarely governs this case. It stands, we submit, for the proposition that a veteran who actually completes his training period after his honorable discharge and reemployment, and who had a contractual right to higher status upon completion of that period, is entitled to the higher status from the date he would have completed the training had he not entered the service. Nor does the *Diehl* decision leave any room for wholesale speculation as to unforeseeable fortuitous circumstances that might have intervened to prevent the veteran from achieving, or to delay his achievement of, the higher status; if he has a contractual right to the higher status, he is entitled to the protection of the Act. In refusing to follow the *Diehl* case, the court below plainly erred.

2. The court below departed from *Diehl* because, in its view, the later decision of this Court in *McKinney* v. *Missouri-Kansas-Texas R.R., supra,* changed the law by introducing the requirement "that the promotion in question be automatic * * * as a matter of foresight" (App., *infra,* p. 14a)—*i.e.*, that it be pre-

dictable beyond peradventure at the time the veteran entered the service. This interpretation of the *McKinney* case is, we submit, erroneous; indeed, it would largely read out of the statute the so-called "escalator" right (see *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–285) that Congress intended to provide.

In the *McKinney* case, the promotion in question was to be announced or "bulletined" when it became available; those in McKinney's lower position were entitled to bid for it and would be given preference over nonemployees, "based upon fitness and ability * * *." McKinney was called into the service from his lower position, and during his absence two promotions became available, were announced and were filled by nonemployees. Upon his return, he claimed that under the Act, he should have been promoted to the higher position and given seniority therein as of the date of the first opening which occurred during his absence.

This Court rejected the veteran's contention, finding that the promotion in question "is not dependent simply on seniority" but is "dependent on fitness and ability and the exercise of a discriminating managerial choice" (357 U.S. at 272). The Court went on to point out (*ibid.*):

> The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

The Court concluded that, where management had reserved the discretion to have promotions depend "upon fitness and ability," the employee could scarcely be considered as entitled to a promotion "as of right."

It is clear from a reading of the Court's opinion in the *McKinney* case that it ruled against the veteran solely because of this reservation of managerial discretion in the promotion process—a circumstance not present in the instant case. The decision stands for the proposition, therefore—not that a lack of absolute certainty that an "automatic" promotion will take place deprives the veteran of the Act's protection—but that the dependence of a promotion on an affirmative exercise of managerial discretion vitiates its "automatic" character. That this is so is further demonstrated by the fact that the Court remanded the *McKinney* case to give the veteran an opportunity to prove (as he had argued) that, notwithstanding his employer's apparent reservation of discretion, in fact by custom and practice he, as the senior union bidder for the higher position, would necessarily have obtained it. And yet the same kinds of obvious "variables" were present there as here: for example, it could not be predicted with certainty when McKinney entered the service (1) that a higher position would become available, (2) that he would not already have lost his lower position because of unsatisfactory performance, or (3) that he would in any event elect to bid for the higher position. If the Court had believed that such circumstances could affect the "automatic" character of a promotion, there would have been no point in its remanding the case to the trial

court for evidence concerning custom and practice.

It is thus clear that, in requiring that the attainment of a genuinely automatic promotion be predictable with absolute certainty, the court below seriously misread this Court's decision in the *McKinney* case. And its reading would, we submit, render the "escalator" rights bestowed on veterans by the Act largely meaningless. It is difficult to imagine a case where, at the time the veteran entered the service, it could be predicted with absolute certainty that all of the conditions necessary to his attaining a promotion would later occur. The "variables" cited by the court below will be present in most cases—the possibility, for example, that the veteran might have been laid off or fired before the promotion became available, or that he would not accept a promotion to which he was automatically entitled. To these could be added any number of other "variables"—for example, that the higher position might be eliminated by the employer's going out of business or merging with another company (cf. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40). If the veteran's "escalator" right depends upon such wide-ranging speculation, it is an empty right indeed.

3. The decision below is also in conflict with a number of rulings of other courts of appeals, which have sustained the claims of veterans to "escalator" rights notwithstanding the fact that the attainment of the right in question was not absolutely predictable as of the time the veteran entered the service, being dependent upon the very same types of "variables" as those cited by the court below. Thus, in

*Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), the court recited the fact that the promotion in question depended upon (1) the occurrence of a vacancy, and (2) the individual's making a bid for the vacancy (171 F. 2d at 579). In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A. D.C.), the court noted that the transfer in question depended upon (1) a need for additional personnel in the higher position, (2) an "election" by the individual for the transfer, and (3) the individual's being "in good standing" in his lower position (177 F. 2d at 857). In neither case was the existence of these "variables" held to affect the otherwise "automatic" character of the rights at issue. See also *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2), and *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), where, although the courts did not spell out all of the prerequisites to the attainment of the rights in question, it is fairly inferable that, at the least, continued satisfactory performance on the part of the employee (one of the "variables" cited by the court below) was a necessary condition; nevertheless, the veterans were held entitled to their "escalator" rights.

The fact that these decisions were rendered before the *McKinney* decision of this Court does not, we submit, alter the situation. As we have noted, we do not read the *McKinney* case as having intended to change the law in this area; it merely held that where the attainment of a promotion depends upon the supreme imponderable of managerial discretion (a factor present in neither the present case, the *Diehl* case nor any of the above decisions of the courts of appeals),

it cannot be said to be sufficiently "automatic" to bring the "escalator" right of the veteran into play.

4. The decision below would adversely affect a very substantial number of veterans whom Congress intended to protect through the "escalator" reemployment rights guaranteed by the Act. The upgrading arrangement of the Railroad in this case is comparable to those in effect on many other railroads and in many other industries having hundreds of thousands of workers. With the continued draft of a young men into the armed forces, the problems presented in this case are bound to recur time and again. Moreover, the spread of automation magnifies the importance of seniority and gives the issue added importance for the future.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ARCHIBALD COX,
*Solicitor General.*

JOSEPH D. GUILFOYLE,
*Acting Assistant Attorney General.*

SHERMAN L. COHN,
EDWARD A. GROOBERT,
*Attorneys.*

DECEMBER 1962.

669109—62——8

# APPENDIX

## United States Court of Appeals for the Eighth Circuit

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No. 16814

DONALD I. TILTON, APPELLANT

*v.*

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

---

No. 16815

WILFRED L. BECK, JR., APPELLANT

*v.*

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

---

No. 16816

GUY H. MCCLEARN, JR., APPELLANT

*v.*

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

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*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI*

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[August 17, 1962]

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Before VOGEL, BLACKMUN and RIDGE, *Circuit Judges*

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BLACKMUN, *Circuit Judge.*

These are separate actions instituted under § 9 of the Universal Military Training and Service Act, as

amended, 50 U.S.C. App. § 459.[1] The three plaintiffs, employees of Missouri Pacific Railroad Company, were each promptly reinstated in railroad employment following satisfactory completion of a period of military service. By these suits, however, the plaintiffs, represented by government counsel as authorized by § 9(d) of the Act, now seek to compel the railroad to grant them the higher seniority which they allegedly would have attained had military service not interrupted their civilian employment.

The actions were consolidated for trial. The district court held that the plaintiffs were not entitled to the relief they sought. It entered judgment for the defendant in each case.

The facts of the three cases are parallel. For the most part they are stipulated and, in any event, the trial court's findings of fact are not challenged here.

World War II occasioned a shortage of qualified carmen. In an attempt to cope with this situation the railroad and the bargaining representative, Brotherhood Railroad Carmen of America, entered into a series of agreements.[2] The pertinent provisions of the applicable contract are set forth in the margin.[3] In gen-

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[1] This Act, adopted in 1948, succeeded the Selective Training and Service Act of 1940, 54 Stat. 885.

[2] The agreement important here is one effective August 1, 1953, and is collateral to the basic agreement between the railroad and the union. It is a successor to other agreements and in turn has since been supplemented. The parties concede its applicability.

[3] SECTION 1.

When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

Advancements will be made in the following order and manner:

* * * * * * *

(d) Should the need for carmen not be met by the advance-

eral summary, it (a) provides for the advancement, under certain conditions, of carmen helpers to temporary carman status; (b) specifies that selection of helpers so to be advanced shall be made as the master mechanic or shop superintendent and the union's local committee agree; (c) calls for a chronological listing

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ment of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, * * * the names of the helpers not agreed on * * * will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. * * *

SECTION 2.

A list of all men advanced temporarily as carman will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown. * * * The listing of the dates is not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading * * *

SECTION 3. * * *

(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

SECTION 4. * * *

* * * helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the

of men so upgraded; (d) denies that this dated listing connotes seniority; (e) specifies that any reduction in the force shall be in reverse chronological order; (f) provides for a helper's retention of his helper's seniority during the period of his temporary upgrading; (g) recognizes carman qualification upon a helper's completion of 1040 days of carman service; (h) requires the employee then to select either a carman's status and seniority date as of that time (coupled with a relinquishment of his helper's seniority) or a return to a helper's status; and (i) preserves any temporary upgraded status of a helper who has entered military service.

The pertinent portions of § 9 of the Act are also reproduced in the margin.* They provide that one who has left his work with a private employer to enter military service and who makes timely applica-

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United States and by agreement between the Organization and the Carrier will be governed by the following:

* * * * * * *

(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

SECTION 5.

Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

* * * * * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to

tion for reinstatement after the completion of his service shall, if still qualified, be restored "to such position or to a position of like seniority, status and pay", shall be considered as having been on leave of absence during the service period; "shall be so restored without loss of seniority", and shall not be discharged from his position without cause for a year, and that it was the intent of Congress that he should be so restored "as to give him such status * * * as he would have enjoyed if he had continued in such employment continuously".

Each of the three plaintiffs here (a) was originally employed by the railroad as a carman helper, a non-temporary position; (b) was subsequently, pursuant to the bargaining agreement, upgraded to temporary

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such position or to a position of like seniority, status, and pay; * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. * * *

The 1940 Act contained provisions similar to those of § 9 (b) and (c)(1) but in the earlier Act those provisions were in § 8 (b) and (c). § 9(c)(2) is new in the present Act.

carman while retaining his helper's seniority; (c) completed, before leaving for military service, only part of the 1040 day work period necessary for permanent advancement to carman; (d) returned from service to his employment as temporary carman; (e) was given the same relative position on the helpers' seniority roster which he had held before the interruption of his employment,[5] (f) then completed his 1040 days of work as temporary carman; (g) then elected to be a carman and to take carman's seniority; (h) received a carman's seniority date as of that time; and (i) thereupon relinquished his helper's seniority.

The specific progress dates for each plaintiff are:

| | *Plaintiff Tilton* | *Plaintiff Beck* | *Plaintiff McClearn* |
|---|---|---|---|
| 1. Original employment as carman helper | 7-13-49 | 5-12-50 | 5-24-50 |
| 2. Upgrading to temporary carman | 4-10-50 | 10-12-51 | 8-23-51 |
| 3. Departure for military service | 10-12-50 | 3- 1-55 | 10-23-51 |
| 4. Release from military service | 12-23-51 | 3- 57 | 6- 53 |
| 5. Reemployment after service | 1- 2-52 | 3-11-57 | 6-11-53 |
| 6. Completion of 1040 day work requirement and election to take carman seniority | 8-27-56 | 12- 5-57 | 12-24-57 |
| 7. Seniority date on carmen's roster | 8-28-56 | 12- 5-57 | 12-25-57 |

Twenty-nine non-veteran helpers in Tilton's case, six in Beck's, and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status with its more advanced seniority.

[5] In line with § 9(c)(2) of the Act and *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 270-1.

These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

The plaintiffs complain that their seniority was adversely affected by their absence in military service in that these non-veteran employees, junior on the temporarily upgraded list, are now ahead of them on the permanent list. They claim seniority status ahead of these non-veteran employees. They concede the existence of uncertainties, at the time of induction, as to ultimate qualifications but they assert that, now that they have completed the work requirement; their desired priority in seniority status is no more than the situation which would have existed had their civilian employment not been interrupted by service. The plaintiffs' position here is exemplified by the following excerpt from their reply brief:

> Appellants do not contest the existence of various conditions or "uncertainties" surrounding the completion of their 1040 days actual work on the job. * * * What appellant [appellee?] fails to take into account, however, is that following their return from military service, the veterans' satisfactory performance of the work requirement and their meeting of any proficiency test, their election of promotion to journeyman, and the existence of vacancies and availability of work at all material times have, in their particular cases, *resolved or eliminated* all of these "uncertainties." There is indeed nothing "automatic" about their completion of the work requirement, but once they have completed it, they are entitled to have their seniority date established, *nunc pro tunc,* as of the date they would have completed had they not entered military service.

We feel that this posture on the part of the plaintiffs compels a conclusion that the judgments for the defendant were correct. A review of the decided cases, however, is in order.

The landmark is *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275. That case concerned a shipyard welder, the 1940 Act, and a bargaining agreement which provided that layoffs, where ability was fairly equal, should be controlled by length of service. That the welder's relative seniority was maintained while he was in military service is apparent from the Second Circuit's opinion in the case at 154 F. 2d 785, 787. The employee, however, claimed, when he was a victim of a layoff made in the inverse order of seniority, that the 1940 Act protected him against layoffs over all non-veterans. The Supreme Court rejected this argument and held that the welder was entitled only to the maintenance of his relative seniority on the welders' roster. In so doing it articulated its escalator principle in the following frequently quoted language, pp. 284-8 of 328 U.S.:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. * * * He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country * * *. Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * This legislation is to be liberally construed

> * * *. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. * * * He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer * * *. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems * * *.

This interpretation was reaffirmed in *Trailmobile Co.* v. *Whirls*, 1947, 331 U.S. 40, 58, where it was said that the veteran is to be kept "in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'"; in *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 1949, 337 U.S. 521, 526; and in *Oakley* v. *Louisville & Nashville R.R.*, 1949, 338 U.S. 278, 283.* Its subsequent codification in 1948 now appears as § 9(c)(2) of the present Act, 50 U.S.C.A. App. § 459(c)(2). This is recognized by the Supreme Court in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 271. The retention of the present

* Although the issue is not present in the cases before us, it is to be noted that the Supreme Court's definition of seniority is a broad one and allows consideration of far more than mere length of service. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, supra; *Ford Motor Co.* v. *Huffman*, 1953, 345 U.S. 330.

plaintiffs in their same relative positions on the helpers' roster after their military service was clearly in compliance with this principle.

*Fishgold* was followed by a number of cases concerning the application of the escalator rule to the more complex situation of the employee who, having attained seniority at one level, was, when called into service, in the process of completing a work period required for promotion to a higher level. These cases produced the following results:

(a) Where the work period was not for the development of proficiency but was for another purpose, such as the protection of the seniority of others, the claimant's time in military service was to be counted toward the period's completion. *Spearmon* v. *Thompson,* 8 Cir., 1948, 167 F. 2d 626, 630–1, cert. den. 335 U.S. 822; *Moe* v. *Eastern Air Lines,* 5 Cir., 1957, 246 F. 2d 215, 220–1, cert. den. 357 U.S. 936. *Cf. Borges* v. *Art Steel Co.,* 2 Cir., 1957, 246 F. 2d 735.

(b) The converse was also established, that is, where the work period was for the development of proficiency, it was not to be satisfied, in whole or in part, by military service but, instead, was to be actually worked. *Altgens* v. *Associated Press,* 5 Cir., 1951, 188 F. 2d 727, 729; *Lipscomb* v. *Tennessee Coal, Iron & R. Co.,* 5 Cir., 1951, 189 F. 2d 708; *Addison* v. *Tennessee Coal, Iron & Railroad Co.,* 5 Cir., 1953, 204 F. 2d 340, 342; *Nevins* v. *Curtiss-Wright Corp.,* 6 Cir., 1949, 172 F. 2d 535; see *Spearmon* v. *Thompson,* supra, 8 Cir., 1948, p. 630 of 167 F. 2d, and *Moe* v. *Eastern Air Lines,* supra, p. 220 of 246 F. 2d.

The issue now before us, however, involves a still further refinement. If the work period is one genuinely directed toward proficiency and thus, by the last cited cases, is actually to be served, and if it is completed following the claimant's return from serv-

ice, is he entitled to a seniority date in the earned position only as of the date of actual completion or retroactively to some earlier date? The decided cases, although often cited in support of varying points of view, seem to provide these answers:

(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. *Diehl* v. *Lehigh Valley R.R.*, 1955, 348 U.S. 960, reversing, per curiam, the Third Circuit's decision at 211 F. 2d 95, which in turn had affirmed the district court, 22 C.C.H. Labor Cases, Par. 67, 375; *Mann* v. *Crowell-Collier Publishing Co.*, 6 Cir., 1956, 239 F. 2d 699, 701; *Norris* v. *Robertshaw-Fulton Controls Co.*, E.D. Tenn., 1957, 150 F. Supp. 431, 432; *Bostick* v. *General Motors Corp.*, E.D. Mich., 1958, 161 F. Supp. 212, 216; *Nichols* v. *Southern Ry.*, E.D. Ky., 1961, 194 F. Supp. 148, 150. See *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, 1958, 357 U.S. 265, 273–4.

(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld. *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, pp. 271–2 of 357 U.S., where it was said:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been

his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. * * * Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability.

*Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 1958, 259 F. 2d 122, 124, where this court said:

Since it is manifest that this is a strong or high probability situation, the trial court's conclusion finds full support in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, supra. That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief,

> the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice.'

*Raulins* v. *Memphis Union Station Co.*, 6 Cir., 1948, 168 F. 2d 466, 469; *Poore* v. *Louisville & Nashville R.R.*, 5 Cir., 1956, 235 F. 2d 687, 691; *Bassett* v. *Texas & Pacific Ry.*, 5 Cir., 1958, 258 F. 2d 819; *Horton* v. *United States Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710, 713; *Palmquist* v. *Buhl Sons Co.*, E.D. Mich., 1959, 179 F. Supp. 638.

These decisional results are not contested by the claimants here. Their argument, as already indicated, is that, despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act. We have found only two cases, *Morris* v. *Chesapeake & Ohio Ry.*, 7 Cir. 1948, 171 F. 2d 579, cert. den. 336 U.S. 967; and *Conner* v. *Pennsylvania R.R.*, D.C. Cir. 1949, 177 F. 2d 854, cert.

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[1] In *Sularz*, although the issues litigated concerned other non-veterans, the railroad eventually gave the claimant the retroactive seniority refused here. See *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, D. Minn., 1956, 148 F. Supp. 83, 85, and p. 123 of 259 F. 2d, footnote 2. This, however, was pursuant to a later agreement with the union and did not rest upon the provisions of the Act. It thus affords no precedent for the present cases.

den. 339 U.S. 919, where courts of appeals appear to have allowed later events to dispel antecedent uncertainties. The serious obstacle to the authoritativeness of these two cases is the great likelihood that they are effectively overruled by *McKinney* and by its requirement, for a contrary result, that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Plaintiffs do not rest their cases on *Morris* and *Conner* but, instead, urge that the Supreme Court's summary and per curiam reversal of the Third Circuit's decision in the *Diehl* case compels a conclusion in their favor here; that uncertainties did exist in *Diehl;* and that they were eliminated by performance.

We disagree. The summary reversal in *Diehl,* if the case is not inconsistent with *McKinney,* is perhaps to be explained by a conviction on the Court's part that there was no uncertainty involved in the *Diehl* facts. This seems to be indicated by the Court's positive reliance on *Oakley* v. *Louisville & Nashville R.R.,* supra, 338 U.S. 278, where no uncertainty is ascertainable from the Court's opinion, and by the stipulation[8] in *Diehl,* p. 97 of 211 F. 2d, that the claimant "would have completed" the work period on a given date if there had been no military service interruption. These stipulated words imply that the work completion was not dependent upon prior resolution of any contingency or uncertainty.

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[8] The parties in their briefs here both refer to a stipulation in *Diehl.* We find no clear reference to a stipulation in the opinions of either the Third Circuit or the district court. Inasmuch, however, as the plaintiffs' present counsel argued the *Diehl* case in the Supreme Court, we assume the existence of the stipulation. In any event, the trial court there appears to have found as a fact that the plaintiff "would have completed" the work period on a given date.

The present cases are otherwise. The trial court found specifically that by the bargaining agreement the initial choice of carmen helpers for upgrading was a matter of selection, not upon chronological seniority alone, but by the union and the railroad "with due regard to seniority and qualifications for advancement"; that by this the parties meant "aptitude for learning the trade and skills of a carman"; that "they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected"; that in actual practice, "the selection of helpers for upgrading was not always in strict order of seniority";* that the 1040 day requirement called for actual work for that period and was intended by the railroad and the union as an on-the-job training period "for the purpose of increasing proficiency in skill through actual experience"; that actual practice "was in accord with that intention"; that helpers' completion of the work period was required before they were "considered sufficiently skilled to qualify as carmen and acquire a carman's seniority"; that "the position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper"; that whether the plaintiffs, if they had not been in military service, would have worked as temporary carmen on every date work was available and would have completed the work period before the next junior upgraded helper or by any given date, "is not certain, even though in retrospect it may be regarded as highly probable"; that it was also uncertain whether the particular plaintiff would have elected at the earlier date to relinquish his helper's seniority; that the

*This is illustrated by the dates of upgrading of plaintiffs Beck and McClearn set forth in the table, supra.

upgraded helpers had no guaranty, either by contract or by actual practice, that they could ever complete the work requirement; and that completion and the date thereof depended "on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position". Findings of this kind were not present in *Diehl*. We also note that each plaintiff's helper's seniority was at all times preserved, that only at the completion of the work period did the employee make his final choice between a currently dated carman seniority and the retention of an earlier achieved helper's seniority, and that the record discloses instances of voluntary retention of helper status and seniority following completion of the work period. All this, it seems to us, as it did to the district court, lacks the essentials of the automatic in the entire system of promotion from carman helper to full-fledged carman.

*McKinney* instructs us that each of these plaintiffs is not entitled to "perfect reproduction of the civilian employment that might have been his" if he had not been called to service; that there is much "that might have flowed from experience, effort, or change to which he cannot lay claim under the statute"; and that the Act "does not assure him that the past with all its possibilities of betterment will be recalled" or give him "a status that he could not have attained as of right". The situation here strikes us as clearly falling on that side of the factual line governed by *McKinney* rather than on the side governed by *Diehl*.

Of course, if *Diehl* and *McKinney* are in any way inconsistent in their holdings, we must necessarily

follow *McKinney* as the latest pronouncement by the Supreme Court.

The plaintiffs would distinguish *McKinney* on the ground that the claimant there sought to establish only that his seniority rank alone gave him the right to promotion and that, having taken this stand, he had to prove that fact or lose his case. They further state that the Court's comments in *McKinney* are manifestly inapplicable where a plaintiff's claim is based on seniority plus other elements and it is established as a fact that those other elements exist. This, they say, was the situation in *Diehl* and *Oakley*. Furthermore, all the uncertainties which had earlier existed had disappeared by the time of trial and thus had the veterans not been absent they would have been promoted ahead of the upgraders junior to them.

We think that *McKinney* is not so easily explained away. Accepting the trial court's findings as to contingencies and probabilities, which, as we have already noted, are not challenged here, the reasoning of *McKinney* compels us to conclude that the entry of judgment for the defendant in each case was correct. Until the Supreme Court tells us otherwise, we necessarily follow what we feel is the holding of that case.

Affirmed.

A true copy.

Attest:

*Clerk, U.S. Court of Appeals, Eighth Circuit.*

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed in U.S. District Court, May 3, 1961]

These consolidated cases came on for trial, and the Court, having considered the pleadings, the evidence, and the stipulation of the parties, and being fully advised in the premises, now finds the facts and states its conclusions of law.

## FINDINGS OF FACT

The Court adopts the stipulation of facts filed herein by the parties and finds the facts stated therein to be true, and the memorandum opinion filed by the Court. In addition, the Court finds as follows:

1. The defendant is a corporation, maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

2. Prior to entering upon military service, each of the three plaintiffs was employed by the defendant in positions other than temporary, and left such positions in order to perform military service. Upon completion of their military service, each of the plaintiffs received a certificate of honorable discharge and applied to the defendant for re-employment within 90 days after such discharge.

3. At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been "set up" or temporarily advanced to the position of carman pursuant to certain collective bargaining agreements which permitted such temporary utilization of carman helpers as carman

because of the shortage of qualified carmen. In their upgraded positions as carmen, the plaintiffs continued to hold seniority or other rights as carmen.

4. Upon the completion of their military service and their application to defendant for re-employment, each of the plaintiffs was restored to his previous position as carman helper, with the same seniority date and the same relative standing on the helper's seniority roster as he had on entering military service. Each was also temporarily advanced to the position of carmen because of the continuing shortage of qualified carmen at the time they were re-employed by defendant.

5. Effective July 1, 1942, defendant entered into an agreement with the union representing carmen and carman helpers which permitted the temporary advancement of apprentices and of helpers to service as carmen as long as qualified carmen were not available to fill carmen's positions. This agreement also provided that helpers so advanced who accumulated three years of service in carmen's positions may acquire a carmen's seniority at the end of their three years of such service.

6. In May of 1947, the defendant and the carmen's union entered into an understanding which abrogated, as to any helpers thereafter selected for advancement, the provision of the 1942 agreement which gave to the helpers who had accumulated three years of service as temporary carmen any right to acquire a carman's seniority. Any helpers selected for advancement after May, 1947, could qualify as carman and acquire a carman's seniority only as provided in Rule 116 of the Basic Collective Bargaining Agreement, which required a minimum of four years' experience in carmen's positions. By the time that any of the plaintiffs had been upgraded, the four-year requirement

was strictly enforced at the points where they were working, and plaintiffs all understood when they were upgraded that four years of actual work in carmen's positions were required in order to qualify as carmen.

7. On December 7, 1953, a collateral agreement was entered into between the defendant and the carmen's union which completely superseded the 1942 agreement, and which established new criteria as to how an upgraded helper could acquire seniority as a carman. In substance, this agreement provided that an upgraded helper would retain his helper's seniority until he had completed a total of 1,040 days' actual work in a carman's position, at which time he was required to make an election in writing either to relinquish his seniority as a helper and take seniority as a carman as of that date, or retain his helper's seniority and go back to working as a helper.

8. Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days worked in a carman's position, counting the days worked prior to the date of the agreement, as well as those worked after the agreement. When an employee had completed 1,040 days in a carman's position, the defendant notified him of that fact so that the employee could then make his election between a helper's seniority and wages or a carman's seniority and wages. If the employee chose a carman's seniority, he was placed at the bottom of the carman's seniority roster.

9. Under the 1953 agreement, as well as the 1942 agreement, the selection of helpers for temporary advancement to positions as carman was made jointly by the shop superintendent or master mechanic acting for the defendant and by the Local Committee acting for the union. The contract further provided that

*selections* for advancement were to be made with due regard to seniority and qualifications for advancement. By "qualifications" the parties meant aptitude for learning the trade and skills of a carman; they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected. As a matter of actual practice, the selection of helpers for upgrading was not always in strict order of seniority.

10. The 1,040 days' work requirement established by the agreement of December 7, 1953, and the four-year work requirement in Rule 116 of the Basic Agreements were intended by the parties thereto as a period of the on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of these plaintiffs were first upgraded, was in accord with that intention, and upgraded helpers, including plaintiffs, were required to complete four years (prior to December 7, 1953) or 1,040 days (after December 7, 1953) of actual work in a carman's position before they were considered sufficiently skilled to qualify as carmen and acquire a carman's seniority.

11. Plaintiffs Tilton and McClearn left for military service prior to December 7, 1953, agreement. At that time, neither one had met the four-year work requirement for promotion to carman, nor could they have met that requirement prior to December, 1953, even if they had been continuously employed. After their return from military service and after the December, 1953, agreement, they were given credit for all days they had worked in carman's positions before the date of that agreement.

12. Before leaving their positions for military service, Plaintiff Tilton had worked a total of 145 days,

McClearn had worked a total of 21 days, and Beck had worked a total of 851 days as temporary carman. After their return and re-employment by the defendant, each plaintiff completed the 1,040 days work requirement established by the 1953 agreement, counting the days worked before military service, as well as days worked after return from military service. Upon completion of the work requirement, each plaintiff elected in writing to relinquish his helper's seniority and to take a carman's seniority. Thereupon the defendant accorded each plaintiff a seniority date as carman as of the date following completion of the 1,040 day work requirement.

13. The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Prior to the shortages of qualified carmen growing out of the war, a person became a qualified carman through four years of apprenticeship training in all phases of a carman's work. Except insofar as the upgrading agreements of 1942 and 1953 permitted carman helpers to be used for carmen's work, when qualified carmen were not available, carman helpers were restricted to the work described in Rule 118 of the Basic Agreements. Separate seniority lists were maintained and carmen helpers had no right to bid on vacancies in the man's classification.

14. The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1,040 day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the work requirement and the date of completion depended on a number of variable fac-

tors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of these cases under the provisions of Section 9(d) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459).

2. The seniority rights of the plaintiffs are subject to non-discriminatory terms and conditions of collective bargaining agreements entered into between employer and employee representatives as provided in the Railway Labor Act. It is not the purpose of the Universal Military Training and Service Act to upset or supersede such terms and conditions or the seniority rights of employees which are determined by the seniority system thus agreed to.

3. In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service.

4. Under the terms and conditions of the agreements by which plaintiffs were permitted to work as temporarily advanced carman, there was no such

right of automatic progression to permanent positions as carman.

5. The plaintiffs had not acquired any contractual rights to positions or to seniority as carman before they entered military service nor before the effective date of the December 1953, agreement. Whatever rights they have to acquire seniority as carman is governed by the terms and conditions of that agreement.

6. Under the December 1953, agreement, the plaintiffs could acquire no seniority rights as carman until (1) they had accumulated 1,040 days of actual work experience in carmen's positions, and (2) they elected in writing to relinquish their helper's seniority and to take a carman's seniority at the time they completed the 1,040 days' work requirement. The period of time when plaintiffs were on leave of absence, in military service, or not working as carmen for any other reason, could not be counted as equivalent to the actual work experience in carmen's positions required by this agreement.

7. Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were. A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression.

8. Plaintiffs have not shown any violation by the defendant of their re-employment rights under Section 9 of the Universal Military Training and Service Act, and are, therefore, not entitled to any relief

sought in these actions. These actions will, therefore, be dismissed upon the merits and judgment entered in favor of defendant.

ROY W. HARPER,
*United States District Judge.*

Dated: May 3, 1961.

JUDGMENT

United States Court of Appeals for the Eighth Circuit

(September Term, 1961)

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No. 16814

DONALD I. TILTON, APPELLANT,

*v.*

MISSOURI PACIFIC RAILROAD COMPANY

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No. 16815

WILFRED L. BECK, JR., APPELLANT,

*v.*

MISSOURI PACIFIC RAILROAD COMPANY

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No. 16816

GUY H. MCCLEARN, JR., APPELLANT,

*v.*

MISSOURI PACIFIC RAILROAD COMPANY

Appeals from the United States District Court for the Eastern District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, affirmed.

AUGUST 17, 1962.



U.S. GOVERNMENT PRINTING OFFICE: 1962